No. 15664

# United States
# COURT OF APPEALS
## for the Ninth Circuit

WALTER HERBERT MACARTNEY,

*Appellant,*

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE, a corporation,

*Appellee.*

## BRIEF OF APPELLEE

*Appeal from the United States District Court for the District of Oregon.*



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## SUBJECT INDEX

TABLE OF CASES

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## STATEMENT OF THE CASE

The circumstances surrounding appellant's injury are substantially without dispute. He and his longshore gang began unloading crates of glass from the No. 4 hold of the M/S WYOMING at 1:45 P.M. on October 10, 1954. The gang in the hold divided itself into two groups, each working on one side of the ship with appellant in the offshore or port side group. The crates of glass were stowed in the after end of the hatch at the shelter deck level.

The longshoremen took the crates from the place where they were stowed up to the square of the hatch on a four-wheeled dolly furnished by their employer, Oregon Stevedoring Company. When the load reached the square of the hatch, it was tilted by the longshoremen from the dolly onto wooden blocks. Slings were then sent down by the winches, wrapped around the crate and hoisted up.

Each group of longshoremen had one of these dollies. A photograph of a similar dolly is Exhibit 3-B. Such dollies have been in general use in the Portland harbor for 12 to 14 years (T. 152) and were patterned after those used by W. P. Fuller Company (T. 152).

Appellant was injured sometime after two o'clock P.M. He and his partner, Raanes, took the dolly back to the crates and loaded one on it. They then moved the loaded dolly over to the square of the hatch and left it parked there because another crate was already on the blocks on the port side. Both appellant and his partner continued to hold onto the dolly and its load until the slings came down to remove the crate then on the blocks. Raanes left the dolly and engaged himself in securing the sling at one end of the crate. Another man was securing the sling at the after end. For some unexplained reason, appellant left the load on the dolly unattended and stepped in front of it. While he was standing between the crate on the dolly and the one on the blocks, the crate fell off the dolly and upon his legs, causing the injuries of which he complains. A sketch showing the locations of the crates of glass and the longshoremen is Exhibit 27.

In this action the appellant made two charges of fault against appellee, couching them similarly in negligence and under the doctrine of unseaworthiness. He contended first that appellee permitted to be used and used a dangerous and unsafe and unseaworthy dolly or hand truck as part of the regular gear, appliances and equipment used on the vessel, and second, that appellee caused too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean and heel over.

There was no evidence of any defect in the dolly. The same type had been used for 12 to 14 years before the accident (T. 152) and was still being used at the time of trial (T. 153). After the accident the longshoremen continued unloading the glass with the same dolly until the job was completed at 6 P.M. (T. 49). Where there was no evidence of any defect in the dolly being used at the time of appellant's injury and no evidence of any improper or inadequate construction of the dollies generally, appellant wholly failed to prove his first charge of fault, either in negligence or unseaworthiness.

There was likewise a complete failure of proof that unloading operations caused the ship to "lurch, careen, tilt, slant, lean and heel over." At the time of appellant's injury, there was no unloading operation being conducted anywhere on the vessel. Only two hatches had gangs working, No. 4, where appellant was, and No. 3, where they were loading frozen fish (T. 132, Ex. 25). No unloading at No. 4 could have caused any movement of the ship because at the time of appellant's injury

there was no cargo on the gear at No. 4. As the winch driver testified (T. 113):

> "Q. So that the operation of your gear to [at] that moment of his injury could not have caused any movement of the ship?
>
> A. Not our particular gear, no."

Much is said in appellant's testimony attempting to make out a permanent inshore list. Not only was such testimony outside the issues of the case, but it also failed to prove the existence of such list or a causal connection with the accident. At most the longshoremen felt that the offshore gang had an easier job to push their dollies. The supercargo testified that there was no appreciable list the day of the injury and defined appreciable as anything over two or two and a half degrees (T. 137).

Inasmuch as no unloading operations were being conducted when appellant was injured, any movement of the vessel was only the normal working of a ship in water. As such the longshoremen are well aware of it and work accordingly. As stated by Mr. DeFrancisco, one of the other longshoremen in the hold (T. 80, 81):

> "Q. In your experience on the water front, Mr. DeFrancisco, isn't it true that all ships while they are being loaded or unloaded work a little bit in the water back and forth?
>
> A. Usually they do rock back and forth.
>
> Q. Not only by cargo but a passing ship might make it go?
>
> A. Yes, that is right; it will bob.
>
> Q. It is something that you experienced longshoremen are aware of? You know about it?
>
> A. Yes, I know about it.
>
> Q. And in your loading or unloading operations you always take that into account on how you are

working, do you not, that the ship is going to be moving a little bit?

A. Well, yes, if you put it that way, it is something—when you work on a ship like that there you get used to that movement, and it's just like working out here on the floor, it don't bother you. It don't actually bother you in any way."

* * * * *

Q. If there is this constant movement on a ship, the rocking back and forth that we have talked about, you conduct your work accordingly to protect yourself, don't you?

A. That is right.

Q. You have to?

A. That is right."

Under the issues in this case, the record shows that appellant has not produced any evidence to justify a judgment in his favor. This was the finding of the jury and was concurred in by the trial judge. The trial court so indicated when taking appellee's motion for a directed verdict under advisement (T. 159). Special interrogatories were submitted to the jury, which it answered as follows (T. 15):

"1. Was the dolly unseaworthy or unsafe?

A. No.

2. Was the M/S Wyoming caused to lurch, careen, tilt, slant, lean or heel over by reason of the fact that too much cargo was being unloaded from one part of the ship at that time?

A. No."

After the verdict, the trial court again indicated its feeling of the lack of merit in appellant's case (T. 195):

"All this is in addition to the fact that throughout the trial I indicated to you that I could not see where there was any negligence. I know that I told

you that at the end of the plaintiff's case in chief and again when the case was completed. I believe I indicated to you, but, if I didn't, I intended to tell you that if you did get a verdict I would set it aside on the ground that there was no evidence of negligence whatsoever on either of the two grounds that you alleged. In view of that fact, I am not in a position to certify that this appeal has any merit, and under no circumstances would I order the Government to pay the costs of a transcript and record on appeal. In view of my strong belief about the lack of merit of your case, I cannot see how I could do that."

Despite the foregoing, appellant seeks reversal in this court, clutching at straws in an attempt to substantiate error. As will be demonstrated, none of appellant's points of error has merit.

## SPECIFICATION OF ERROR NUMBER ONE

### Summary of Appellee's Points

Counsel has a duty to be in attendance with the court to protect his client's interest at all times between the impaneling of the jury and the return of the verdict. His failure to be present at any time during the proceedings constitutes a waiver on his part.

Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383, 32 L. Ed. 439.

Finn v. Carnegie-Illinois Steel Co. (D.C., W.D. Pa., 1946), 68 F. Supp. 423.

Hartol Petroleum Corp. v. Cantelou Oil Co. (D.C., W.D.Pa., 1952), 107 F. Supp. 373.

Arrington v. Robertson (C.C.A. 3, 1940), 114 F.2d 821.

No error was committed by the trial court in giving supplemental instructions to the jury in open court and with the court reporter present recording the proceedings, even though counsel for the parties were not present.

Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383, 32 L. Ed. 439.
Finn v. Carnegie-Illinois Steel Co. (D.C., W.D. Pa. 1946), 68 F. Supp. 423.
Yates v. Whyel Coke Co. (C.C.A. 6, 1915), 221 F. 603, 608.

The supplemental instructions as given by the trial court were not prejudicial to appellant, and therefore could not be ground for reversal.

Sandusky Cement Co. v. Hamilton & Co. (C.C.A. 6, 1923), 287 F. 609.
Ray v. U. S. (C.C.A. 8, 1940), 114 F. 2d 508, 513.
Ah Fook Chang v. U. S. (C.C.A. 9, 1937), 91 F. 2d 805.

## Argument on Specification One

Appellant contends that the giving of supplemental instructions to a jury in the absence of counsel is error. The rule announced by the courts is not as broad as appellant urges, and the cases cited by him do not support his proposition.

There is no doubt that the jury system is founded upon the theory that disinterested jurors will hear the evidence in open court and on that evidence alone deliberate among themselves until a verdict is reached. Any communication with the jury that is not made in open court is subject to abuses and opens the way toward the

destruction of confidence in the jury system. *Ray v. United States,* 114 F. 2d 508, 513.

In every one of the cases cited by appellant the communication with the jury was not in open court. In *Fillippon v. Albion Vein Slate Co.,* 250 U.S. 76, 63 L. Ed. 853, the jury sent the judge a written inquiry. The judge replied with a written instruction sent to the jury room, in the absence of parties and their counsel, without their consent and without calling the jury in open court. The instruction sent to the jury room was also an erroneous instruction. In reversing the Supreme Court called attention to the rule (250 U.S. at page 81):

> "Under ordinary circumstances, and wherever practicable, the jury ought to be recalled to the courtroom, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had."

The next case cited by appellant, *Arrington v. Robertson,* 114 F. 2d 821, presented similar facts. The trial court sent a written instruction to the jury room in response to the request of the jury. The record, however, did not disclose the jury's question, so the appellate court could not determine whether the supplemental instructions, although correct in the abstract, were appropriate. Again, the appellate court based its decision on the "private" nature of the communication.

*Snyder v. Lehigh Valley Ry. Co.,* 245 F. 2d 112, is another instance of a "private" communication. The jury sent a written inquiry to the trial judge, who, without notice to counsel, orally instructed the marshal to advise

the jury that the answer to their question was in the negative. The answer of the trial court was based on an erroneous assumption.

This was also the factual situation in *Parfet v. Kansas City Life Ins. Co.,* 128 F. 2d 361, where the jury handed the bailiff a note to the judge. The bailiff took the note to a deputy marshal who in turn took it to the judge's residence. The judge directed the marshal to answer the inquiry verbally, which was done.

The fatal error in *Ah Fook Chang v. United States,* 91 F. 2d 805, was similar. Here the foreman of the jury went to the judge with a question. The court, in the presence of both counsel, in chambers, gave additional instructions to the foreman to pass on to the jury. Because there was no way of knowing what the foreman relayed to the jury, the cause was reversed.

It is quite apparent from this analysis that the citations relied upon by appellant stand at most for the rule that "the jury ought to be recalled to the courtroom, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had." *Fillippon v. Albion Vein Slate Co.,* supra. In none of appellant's citations was this admonition of the Supreme Court observed.

But the facts in the cause herein do show that the Supreme Court's directions were followed. The additional instructions were given in the courtroom to which the jury had returned and were officially reported by the court stenographer (T. 184). Under such circum-

stances, it was the duty of counsel to be in attendance. If he has failed to do so, he has waived his right to be present and cannot complain at this time.

It has been repeatedly held by the United States courts that it is not error for the court to instruct the jury in open court in the absence of counsel while the court is in session.

The leading case on this point is *Stewart v. The Wyoming Cattle Ranche Company* (1888), 128 U.S. 383, 32 L. Ed. 439, where the court stated, at page 390:

> "The absence of counsel while the court is in session, at any time between the impaneling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require."

Recently this rule was followed in *Finn v. Carnegie-Illinois Steel Corp* (D.C., W.D.Pa. 1946), 68 F. Supp. 423. At page 428 the court held:

> "Furthermore counsel interested in a case which is on trial has a duty to be in attendance with the court to protect his client's interest until the whole subject matter of the litigation is finally disposed of, and that the court is not thereby required to suspend its operations until counsel is present. *Ward v. Todd,* 103 U.S. 327, 330, 26 L. Ed. 339; *Cooper et al v. Morris,* 48 N.J.L. 607, 7 A. 427; *Cornish v. Graff,* 36 Hun. 160; *Aerhart v. St. Louis I. M. & S. R. Co.,* 8 Cir., 99 F. 907, 910; *Yates v. Whyel Coke Co.,* 6 Cir., 211 F. 603, 608."

Even some of the authorities relied on by appellant as granting reversals because the supplemental instructions were not given in open court point out the proper

standards to be those laid down in *Stewart v. Wyoming Cattle Ranche Co.*, supra. In *Arrington v. Robertson*, 111 F. 2d 821, it was stated (P. 823):

> "A party or his counsel may waive this right [to be present at every stage of the trial] expressly. He may also waive it by voluntarily absenting himself from the courtroom in which the trial is being conducted, and in that case the trial judge may proceed with the trial in his absence even to the extent of recalling the jury from their deliberations for such additional instructions on the law as occasion may require. *Stewart v. Wyoming Ranche Co.*, 128 U.S. 383, 9 S. Ct. 101, 32 L. Ed. 439. But as was pointed out in the *Fillippon* case the parties are entitled to anticipate and bound to presume, in the absence of notice to the contrary, that all such proceedings will take place in open court in the courtroom assigned for the trial and will be reported by the court stenographer. Consequently a party or his counsel who voluntarily absents himself from the courtroom consents to such proceedings only as take place in the courtroom in his absence but not to proceedings which take place elsewhere. *Ah Fook Chang v. U. S.*, 9 Cir., 91 F. 2d 805."

See also, *Hartol Petroleum Corp. v. Cantelou Oil Co.*, 107 F. Supp. 373; *Yates v. Whyel Coke Co.*, 221 F. 603, 608; *Railway Express Agency v. Little*, 50 F. 2d 59.

From the facts here and the foregoing authorities it is clear that no error was committed by the trial court in giving the jury supplementary instructions in open court, especially in view of the voluntary absence of counsel.

In any event, the supplementary instructions as given by the court did not change or modify the original instructions and did not prejudice any rights of appellant.

It must be conceded that, where appellant was not prejudiced by the supplementary charge, there can be no ground for reversal. *Sandusky Cement Co. v. Hamilton & Co.,* 287 F. 609; *Ray v. United States,* 114 F. 2d 508, 513; *Ah Fook Chang v. United States,* 91 F. 2d 805.

Appellant makes only two claims that the supplemental instructions in any way were prejudicial to him. These claims are also set forth as Specifications of Error Numbers Four and Five, and are discussed in greater detail in answer to those specifications.

His first claim of prejudice is that the trial court's later instruction changed or modified the degree of proof required (T. 188). An analysis of the entire instruction, which is necessary to get a proper perspective of the phrase taken by appellant out of context, shows that the trial court was merely giving a rather commonly used direction to the jury to arrive at a verdict if it could possibly do so. It suggested only that each juror test his convictions again against the reasonable doubt to the contrary held by his fellow jurors. It did not in any way suggest a new or different degree of proof to be required to sustain a verdict for either party.

The other claim is that some confusion might have arisen with regard to the standards required under the doctrine of seaworthiness (T. 191). This instruction, when considered in the light of the issues of the case and the seaworthiness rule which requires reasonable care and fitness, but not perfection, could not have confused the jury and was not prejudicial to appellant.

When taken as a whole the court's supplementary

instructions were carefully given, and in no way did they change or modify the original instructions. At the very beginning (T. 185) the court carefully directed the jury to consider his supplemental instructions "in the light of the instructions which I previously gave you." After answering the jury's inquiry concerning negligence in a manner which appellant has not challenged in this appeal, the court turned to its instruction urging the jury to agree upon a verdict if it were at all possible without violating the juror's individual judgment and conscience, and concluded by answering the juror's question to define "defective" under the issues of this case. Such instructions were not prejudicial to appellant.

That the jury was not misled is thus shown by the manner in which the jury answered the clear and simple interrogatories submitted to them,—

> "1. Was the dolly unseaworthy or unsafe?
> A. No.
> 2. Was the M/S WYOMING caused to lurch, careen, tilt, slant, lean or heel over by reason of the fact that too much cargo was being unloaded from one part of the ship at that time?
> A. No." (Tr. 15)

This shows no confusion, uncertainty or hesitancy and squarely meets the specific claims of appellant.

Where the trial court was entitled and under a duty to give additional instructions to the jury when requested by him, and the instructions so given are without error and without prejudice to any rights of appellant, there can be no error under appellant's first specification. Counsel cannot create error due to his absence at the time of the giving of these instructions under the circumstances here.

## SPECIFICATION OF ERROR NUMBER THREE

### Summary of Appellee's Point

A jury will not be misled or influenced by the presence or absence of an instruction informing them of the amount of plaintiff's prayer.

Hoffschlaeger Co. v. Fraga, 290 F. 146.

### Argument on Specification Three

Appellant challenges the court's instruction on damages because the court did not tell the jury that his general damages were to be "not exceeding $85,000.00," the amount of his prayer. He does not criticize any other aspect of the instruction on damages.

This point has been frequently raised by defendants who have objected to instructions which did set forth the amount prayed for by plaintiffs. In the cases cited by appellant the courts have held such objection to be an insult to the intelligence of the jury to believe that stating the amount of the claim would influence the jury.

> "But why should the jury be influenced by the amount claimed by the plaintiff, any more than by any other claims advanced by the parties? Such claims are not evidence, and it is an insult to human intelligence to say that they are likely to mislead or otherwise influence the jury." Hoffschlaeger Co. v. Fraga (C.C.A. 9, 1923), 290 F. 146.

The amount of damages for personal injury is always a matter for the best judgment and discretion of the jury based upon the evidence before it. The amount

prayed for in the complaint provides them with no guidepost other than the most imaginative guess of plaintiff's counsel. What the jury needs to know to arrive at a sound decision is the pain and suffering and injuries, past, present and future, his earnings and how his injury will affect his future earnings, the nature of his occupation, age, sex, health and habits. Based upon such evidence, as was explained to this jury (T. 173-175), the jury may find such amount as will reasonably compensate plaintiff. The optimistic hopes of counsel for plaintiff, as expressed in the prayer, cannot be any sort of basis for determining the proper amount of damages.

No cases have been cited by appellant holding that failure to tell the jury the amount of plaintiff's prayer was reversible error. His authorities hold, in effect, that while such an instruction may not be necessary, if given, it is harmless and not prejudicial to the defendant. If telling the jury does not prejudice the defendant, it is difficult to see how not so advising the jury can in any way prejudice the plaintiff. A declaration to the jury of the amount of plaintiff's prayer is a matter to be left to the sound discretion of the trial court.

The jury here decided that there was no liability on the part of appellee, and thus never reached the question of damages. The presence or absence of the amount of the damages claimed by appellant was never a factor considered by them.

## SPECIFICATION OF ERROR NUMBER FOUR

### Summary of Appellee's Points

It is entirely proper for a trial court, after a jury has been deliberating the issues of a case, to give additional instructions urging the jurors to make every honest and reasonable effort to arrive at a verdict.

Allis v. United States, 155 U.S. 117, 15 S. Ct. 36, 39 L. Ed. 91.
Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528.
Hill v. Wabash Ry. Co., 1 F. 2d 626.

The trial court's instruction, when read in its entirety (T. 186-189), is supported by the authorities.

Allen v. United States, supra.
Allis v. United States, supra.
Hill v. Wabash Ry. Co., supra.
Railway Express Agency v. Mackay, 181 F. 2d 257.

The instruction did not change or modify the court's original instruction upon the degree of proof required.

### Argument on Specification Four

In his fourth specification of error, appellant claims the trial court changed or modified its original instructions concerning the degree of proof required. He has taken a phrase from the supplementary instructions and used them out of context in attempting to support his claim.

An examination of the entire charge of the court on this phase (T. 186-189) shows that the court was urging

the jury to arrive at a verdict if it was at all possible without violating the individual judgment and conscience of each juror. This type of instruction has been given frequently by the courts, and so long as the instruction does not intrude upon the jury's independence, it has been approved by the appellate courts.

Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528.
Allis v. United States, 155 U.S. 117, 15 S. Ct. 36, 39 L. Ed. 91.

The court in *Hill v. Wabash Ry. Co.*, 1 F. 2d 626, summarizes these decisions at page 632:

> "From these decisions the conclusion is apparent that the court has the right to attempt to assist the jury by proper instructions in reaching a verdict without intruding on the fundamental right of the jury to determine fact questions."

See also *Railway Express Agency v. Mackay,* 181 F. 2d 257.

The trial court very carefully refrained from doing more than urge the jury to attempt to reconcile any differences they had if it were at all possible. It was repeated many times that each juror should not surrender any honest convictions as to the weight or effect of the evidence.

The court did, in addition, request that each juror examine his views carefully, particularly if a great number of the jurors, who had seen and heard the same witnesses and evidence, had contrary views. When discussing this point, the court asked each dissenting juror to consider whether the doubt in his mind was a reasonable one.

It was first stated from the appellant's standpoint:

> "If much the greater number of you are for the plaintiff, each dissenting juror ought to consider whether a doubt in his or her mind is a reasonable one since it makes no effective impression upon the minds of so many equally honest, equally intelligent fellow jurors who bear the same responsibility, serve under the same sanction of the same oath, and have heard the same evidence with the same attention, with an equal desire to arrive at the verdict." (T. 188)

Then the court stated the alternative from appellee's standpoint:

> "On the other hand, if a majority or even a lesser number are for the defendant, other jurors ought to consider, to ask themselves again whether they have reason to doubt the correctness of a judgment which is not concurred in by many of their fellow jurors and whether they should not distrust the weight or sufficiency of evidence which fails to convince the minds of several of their fellows beyond a reasonable doubt." (T. 188)

By reading all of this, along with the remainder of the instruction on this point, it is clear that the court was not in any way discussing the degree or burden of proof, which had been adequately covered in the original instructions. All that these supplemental instructions did was to ask that each member of the jury test his views against those being held by others—to re-examine his views as to their reasonableness when placed alongside the convictions of his fellow jurors. This is not altering the instructions on degree of proof.

The meaning of these supplemental instructions is apparent when the court went on immediately following the portions quoted above:

> "I think that while one juror, if he is convinced that all the rest of them are wrong, may hold out, and should, but the greater the number who are on one side, the more those dissenting jurors should re-examine their views to see whether there is a rational basis for the opinion which they hold when other jurors or so many other jurors are of the contrary opinion."

The foregoing shows that appellant's initial premise in his contentions under this specification is unsupportable. It is always possible to take some phrase or sentence out of the context of the court's instructions, distort the meaning and claim error. But appellate courts have long held that they will look to the entire charge to determine if there is any confusion in the instructions. Such an examination in the instant case shows neither confusion nor conflict with the court's original instructions nor the imposition of any greater burden upon appellant.

## SPECIFICATION OF ERROR NUMBER FIVE

### Summary of Appellee's Points

Seaworthiness does not require perfection. It is sufficient if the vessel and her appliances are reasonably fit and safe for its purposes and reasonably adequate as to the place and occasion.

The Tawmie, 80 F. 2d 792.
Ruberry v. United States, 93 F. Supp. 683.
Jacob v. City of New York, 315 U.S. 752, 86 L. Ed. 1166.
Sanderson v. Sause Bros. Ocean Towing Co., 114 F. Supp. 849.

## Argument on Specification Five

Appellant in his final claim confuses a portion of the supplemental instructions and attempts to magnify his own confusion into a specification of error. The charge which is challenged is:

> "Mrs. Hruby: Could you please give us a definition of the word 'defective'.
>
> The Court: 'Defective' in this instance would be a piece of equipment which a reasonably prudent person would not have maintained. It does not have to be a perfect piece of equipment. I think I explained that to you. The test of seaworthiness is not perfection but what a reasonably prudent person would have done under all the circumstances."

Throughout this case appellant combined his claims of negligence and unseaworthiness. He claimed the dolly being used was unsafe and unseaworthy and, that because the ship was caused to lurch, it became unsafe and unseaworthy (T. 7, 8). The identical claims were made, but he stated he was proceeding simultaneously under the theory of negligence and the theory of unseaworthiness.

The trial court instructed under both theories, as to unseaworthiness (T. 163-4) and as to negligence (T. 165-6). It also submitted special interrogatories to the jury, asking, "Was the dolly unseaworthy or unsafe?" (T. 172)

It was, therefore, necessary for the court to answer the juror's inquiry in terms of both negligence and unseaworthiness, which it properly did.

While appellant cites cases holding that unseaworthi-

ness is a species of liability without fault, such cases are not in point under this discussion. The validity of the court's instruction rests upon the standards required by the doctrine of seaworthiness. These standards are not considered by appellant, for when the court's charge is read in light of these established standards, the lack of merit in appellant's specifications is readily apparent.

The test of seaworthiness is whether the appliance or vessel is reasonably fit and safe for its purpose. There is no obligation to supply the best equipment but only such as is reasonably safe and suitable. *The Tawmie,* 80 F. 2d 792; *Ruberry v. United States,* 93 F. Supp. 683; *Jacob v. City of New York,* 315 U.S. 752, 86 L. Ed. 1166; *Sanderson v. Sause Bros. Ocean Towing Co.,* 114 F. Supp. 849.

So under either of appellant's theories, as to the dolly, the jury was to determine whether it was reasonably safe and suitable. In the quoted supplemental instruction the court so told the jury. In effect it told the jury they must not test the dolly against what might be "perfect" but only against the standards of "reasonableness."

## CONCLUSION

This cause was completely presented to the court and jury at the trial. Based upon the evidence, both the court and the jury felt there was no basis for recovery, as has been indicated previously in this brief. Appellant's claims of error are without substance.

Appellant urges this court in his concluding argument to determine as a matter of law that appellee was guilty of negligence and unseaworthiness. As has been pointed out, there is no substantial evidence in the record to support either charge. To follow appellant's suggestion this court would be required to find evidence where none exists and to go contrary to the trial court and the jury, both of whom saw and heard the witnesses. Such a review of the evidence has not been the practice of this court.

It is, therefore, respectfully submitted that the judgment in this cause is correct, that the jury verdict is the only conclusion which could have been reached upon the evidence, and that no errors were committed by the trial court which would justify action by this court.

Respectfully submitted,

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